(3)

No. 88-1775

In The

Supreme Court of the United States

October Term, 1988

GARY E. PEEL,

Petitioner,

v.

ATTORNEY REGISTRATION AND DISCIPLINARY COMMISSION OF ILLINOIS,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICUS CURIAE OF ASSOCIATION OF TRIAL LAWYERS OF AMERICA AMERICAN BOARD OF PROFESSIONAL LIABILITY ATTORNEYS NATIONAL ASSOCIATION OF WOMEN LAWYERS NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS NATIONAL DISTRICT ATTORNEYS ASSOCIATION

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Pursuant to Rule 42 of the Rules of this Court, applicants respectfully move this Court for leave to file the accompanying brief as amici curiae in support of the Petitioner in this case. Respondent, through counsel, has denied consent to the filing of this brief.

Applicants are voluntary national associations of practicing attorneys whose goals include the advancement of the administration of justice by fostering the availability

of legal representation to those in need of legal services. A key to this goal is the consumer's access to information that will enable him or her to make an informed decision concerning legal representation.

Individual applicants are identified in greater detail in the accompanying brief. Of greatest significance to this Court's decision on this motion is the fact that applicants are sponsors of the National Board of Trial Advocacy, whose certification of trial specialists is at the heart of this case.

As sponsors of NBTA, applicants have a substantial stake in this Court's resolution of this case. Moreover, applicants believe that their brief in this case will be of assistance to this Court. Applicants are especially concerned that a decision to uphold the censure of Petitioner will also deprive injured victims and other plaintiffs of information they need to make a fully informed decision in retaining legal representation.

For these reasons, applicants respectfully move the Court for leave to file the accompanying brief in this case as amici curiae.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

The Association of Trial Lawyers of America and other named trial lawyer associations respectfully submit this brief as amici curiae in support of attorney-petitioner Peel and to assist this Court in the resolution of an issue of great import to the bar and the general public. A motion for leave to file this brief has been filed with this Court.

Amici are independent voluntary bar associations who are sponsors of the National Board of Trial Advocacy.

The Association of Trial Lawyers of America is an association of over 60,000 attorneys who are engaged primarily in representing the victims of tortious misconduct and in representing criminal defendants. ATLA's sponsorship of NBTA springs from a conviction that competent trial advocacy demands a high degree of knowledge, skill, and experience and that persons in need of legal representation are entitled to objective information regarding an attorney's qualifications as a trial advocate.

The American Board of Professional Liability Attorneys is a highly selective national organization of approximately 350 trial attorney specialists with expertise and experience in professional negligence and product liability litigation.

The National Association of Criminal Defense Lawyers consists of 5,000 members and is the only national bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and

bar organization working on behalf of public and private criminal defense attorneys.

The National Association of Women Lawyers, founded in 1899, includes in its membership private practitioners, prosecutors, public defenders, trial and

appellate judges, law professors and law students.

The National District Attorneys Association, the sole national organization representing local prosecutors in the U.S., was founded in 1950 to reform the criminal justice system for the benefit of all citizens.

These diverse organizations have long shared a concern that the lack of objective information regarding the qualifications of attorneys is a barrier to persons seeking representation and inhibits access to justice. Acting upon this conviction, they have co-sponsored the National Board of Trial Advocacy, whose purposes are to improve the quality of the trial bar by creating rigorous standards for certification and to improve the delivery of legal services by providing the public with an objective, verifiable indicator of experience, ability, and concentration in trial advocacy.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS THE RIGHT OF CONSUMERS TO TRUTHFUL INFORMATION THAT AN ATTORNEY HAS BEEN CERTIFIED AS A CIVIL TRIAL SPECIALIST BY THE NATIONAL BOARD OF TRIAL ADVOCACY.

A. THE FIRST AMENDMENT GUARANTEES PUBLIC ACCESS TO INFORMATION CONCERNING LEGAL SERVICES.

This Court established the First Amendment protection of commercial speech upon a clear principle:

> that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 769-70 (1976). Indeed, commercial speech performs such "an indispensable role in the allocation of resources in a free enterprise system" and so "serves individual and societal interests in assuring informed and reliable decisionmaking," that the free flow of such information is worthy of constitutional protection, albeit less protection than noncommercial speech. *Bates v. State Bar of Arizona,* 433 U.S. 350, 365 (1977). This Court made clear in *Bates* that this principle extends to decisionmaking in the choice of legal representation:

> Advertising does not provide a complete foundation on which to select an attorney. But it seems peculiar to deny the consumer, on the ground that the information is

> incomplete, at least some of the relevant information needed to reach an informed decision. . . . We suspect the argument rests on an underestimation of the public. In any event, we view as dubious any justification that is based on the benefits of public ignorance.

433 U.S. 350, 375-76 (1977).

In this case, the Court again takes up the task of removing such outmoded and paternalistic barriers. At issue also is the fate of a program sponsored by a broadly representative segment of the trial bar which is designed to provide the public with precisely the type of information that would assist in making an informed and reliable decision in selecting a trial attorney.

1. The First Amendment Commercial Speech Doctrine Protects the Public's Right to Information Material to the Selection of an Attorney.

The National Board of Trial Advocacy [hereinafter "NBTA"] recognizes as specialists in trial advocacy those attorneys who meet a rigorous set of standards, including substantial experience in trial advocacy, continuing legal education, disclosure of any professional disciplinary proceedings, and passing an extensive written examination.[1] Attorney Gary Peel, having satisfied all of the program requirements, included the following truthful statement on his business letterhead in the manner prescribed by NBTA: "Certified Civil Trial Specialist By the National Board of Trial Advocacy."

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[1]The extensive NBTA certification requirements are set forth in detail in the Brief of Amicus Curiae National Board of Trial Advocacy.

The Attorney Registration and Disciplinary Commission of Illinois ["ARDC"] recommended that Peel be censured for violation of Illinois Code of Professional Responsibility Rule 2-105(3). That Rule provides, in pertinent part, "no lawyer may hold himself out as 'certified' or a 'specialist.'" The Illinois Supreme Court imposed the sanction of censure on Peel, holding that Peel's statement was misleading, and therefore not protected by the First Amendment. 126 Ill. 2d 397, 534 N.W.2d 980 (1989).

Amici contend that the Illinois court erred in imposing a blanket ban on commercial speech that is not false or misleading. Fundamentally, in the view of amici, the court failed to recognize that the important First Amendment interest at stake is not "respondent's constitutional right of free speech," 534 N.E.2d at 986. It is rather the public's right to the free flow of information regarding legal services.

2. Information concerning attorney qualifications is vital to an informed selection of an attorney.

Code of Responsibility Rule 105(a)(3) is an artifact from a bygone era. It was an era, in theory at least, of small town lawyers whose character and reputation were well known to potential clients and whose professional dignity held them aloof from crass commercialism. *See generally,* Bowers and Stephens, *Attorney Advertising and the First Amendment: The Development and Impact of a Constitutional Standard,* 17 Memphis St. U.L. Rev. 221 (1987); Christensen, *Advertising By Lawyers,* 1978 Utah L. Rev. 619; Note, *Advertising, Solicitation, and the Profession's Duty to Make Legal Counsel Available,* 81 Yale L.J.1181, 1181-85 (1972). In a more cynical view, it was a time in which established lawyers and their corporate clients

suppressed ethnic immigrant lawyers and their working class clients. J. Auerbach, Unequal Justice 41-50 (1976). Bar authorities exercised unrestrained power to forbid all attorney advertising which, like commercial speech generally, was wholly outside the protection of the First Amendment. *Valentine v. Christensen,* 316 U.S. 52 (1942).

That era ended with the decision in *Virginia Pharmacy Board v. Virginia Consumer Council,* 425 U.S. 748 (1976), striking down a ban on advertising by pharmacists. The Court noted that "the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." 425 U.S. at 769-70. Any notion that attorney advertising was somehow different from other commercial speech was quickly and definitively rejected by the Court in *Bates v. State Bar of Arizona,* 433 U.S. 350 (1977). The Court pointed out that the trends of urbanization and specialization long since have removed the typical practice of law from its small town setting, citing R. Pound, The Lawyer From Antiquity to Modern Times 242 (1953), and that information as to the qualifications of lawyers is simply not available to many. 433 U.S. at 374 n.30. In the Court's view, "the historical foundation for the advertising restraint has crumbled." *Id.* at 350.

Speaking in the context of attorney advertising, the Court has emphasized that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 652 (1985). As Justice Pearson, of the Washington Supreme Court states, *Virginia Board of Pharmacy* recognized "a public right to receive information." Pearson and O'Neill, *The First Amendment, Commercial Speech, and the Advertising Lawyer,* 9 U. Puget Sound L. Rev. 293, 302 (1986). This notion, that "there

must be not only a freedom to speak but also a freedom to hear," is "grounded in the idea that an individual is constantly confronted with the necessity of making life-affecting decisions and therefore should have available a free flow of information upon which to base those decisions." *Id.* at 303.

The Illinois court in this case gave too little weight to the First Amendment interest of those who need to obtain an attorney to represent them in litigation. That certain attorneys have been recognized as possessing an objective measure of experience and knowledge in the area of trial advocacy is clearly material to making such a selection. In its earliest examination of attorney commercial speech, this Court recognized that the information of utmost value to consumers concerns not only the price of legal services, but also the qualifications of attorneys. The Court noted that a survey conducted by the ABA Special Committee to Survey Legal Needs found that 79% of those questioned agreed with the statement that people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems. The Court added its own view that, "Although advertising by itself is not adequate to deal with this problem completely, it can provide some of the information that a consumer needs to make an intelligent selection." *Bates v. State Bar of Arizona,* 433 U.S. 350, 371 n.23 (1977).

Empirical studies have proven the Court right. The Federal Trade Commission conducted an extensive investigation of the impact of attorney advertising, which also reviewed the results of other studies. The staff report states:

> The conclusions of this research all point in the same direction. Many people do not consult an attorney, even in situations where they recognize that they may have serious legal problems. . . . The two reasons given most frequently for not consulting an attorney about a legal problem are that attorneys are perceived as charging too much for their services and *that people do not know how to select competent counsel to handle their particular problems.*

Federal Trade Commission Staff Report, "Improving Consumer Access to Legal Services: The Case For Removing Restrictions on Truthful Advertising" 13 (1984) [Emphasis added]. *See also,* Calvani, Langenfeld, and Shuford, *Attorney Advertising and Competition at the Bar,* 41 Vand. L. Rev. 761, 774 n.84 (1988)(noting several studies which found that the factors which consumers identified as important in selecting a lawyer included the area of specialty and the lawyer's past experience).

Amici further submit that when commercial speech serves not only to inform the marketplace, but affects access to justice itself, the constitutional interest in the free flow of information is even greater. As this Court recently announced:

> That our citizens have access to their civil courts is not an evil to be regretted; rather, it is an attribute of our system of justice in which we ought to take pride. The State is not entitled to interfere with that access by denying its citizens accurate information about their legal rights.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 644 (1985).

B. CERTIFICATION BY NBTA ASSISTS THE PUBLIC IN MAKING AN INFORMED DECISION REGARDING LEGAL REPRESENTATION.

Seventeen years ago, the Chief Justice of the United States urged the legal profession to "Face up to and reject the notion that every law graduate and every lawyer is qualified, simply by virtue of admission to the bar, to be an advocate in trial courts in matters of serious consequence." Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Fordham L. Rev. 227, 240 (1973). This was the ground-breaking Sonnett Lecture, in which Chief Justice Burger stated that "some system of certification for trial advocates is an imperative and long overdue step." *Id.* at 227. Indeed, he proposed laying aside work on comprehensive specialty certification "until we have progress in the certification of the one crucial specialty of trial advocacy that is so basic to a fair system of justice." *Id.* at 240.

That proposal became the focus of the deliberations of a conference of judges, scholars and lawyers sponsored by the Roscoe Pound Foundation in 1976. *See,* Trial Advocacy as a Specialty (Final Report of the Annual Chief Justice Earl Warren Conference on Advocacy in the United States, 1976) [hereinafter "Final Report"]. The Conference adopted a set of recommendations that Civil Trial Advocacy and Criminal Trial Advocacy be identified as separate specialties and that "a national bar association may recognize by a certificate those individuals who comply with the standards of specialization . . ." Recommendations IX and X, Final Report, at 23. In a paper presented to the Conference, Prof. James W. McElhaney emphasized: "The certification of trial lawyers as experts in their craft, permitting them to hold

themselves out to the public as specialists, should not rest disproportionately on any single criterion. The profession has the opportunity to require educational standards, testing, peer review, experience, and continuing education." McElhaney, *Lawyers, Law Schools and Legal Institutions: The Dynamics of Implementing the Specialization of Trial Lawyers,* Final Report, 46, 54.

Out of this cauldron of ideas was born the National Board of Trial Advocacy in 1977. Its co-sponsors represent a broad range of trial practitioners who share the twin goals of NBTA to improve the quality of the trial bar by creating rigorous standards for certification and to improve the delivery of legal services by providing the public with an objective, verifiable indicator of experience, ability, and concentration in trial advocacy.

To achieve these goals, NBTA has established an exacting set of standards for certification of trial advocacy specialists. These include substantial litigation experience, disclosure of any professional disciplinary actions, continuing legal education, peer review, passing an extensive written examination, and recertification every five years. A more detailed and precise explanation of these standards is set forth in the brief of NBTA as amicus curiae. Unless we are to be hostage to the "naive assumption" that every law graduate equally qualified for the ultimate confrontation in the courtroom, *See,* Burger, *supra,* at 231, amici submit, certification that an attorney has met these standards would be of assistance to one who seeks a competent trial lawyer.

Amici also urge the Court to be mindful that this decision must often be made in the midst of misfortune. It is the man or woman who has been injured at work or through medical negligence who is suddenly faced with the task of selecting an attorney. It is the family who has lost

a loved one in an auto accident or plane crash. It is the worker without a job because of discrimination or the defrauded small business facing ruin. Under physical and financial stress, these people must select an attorney to evaluate, prepare, and, perhaps, litigate their claims, the resolution of which may affect their lives profoundly.[2] A rule that hides the fact that certain attorneys possess an objective measure of knowledge and experience in civil litigation victimizes them yet again.[3]

II. A BLANKET PROHIBITION ON ATTORNEYS' USE OF "CERTIFIED" AND "SPECIALIST" IN COMMERCIAL SPEECH IS UNCONSTITUTIONAL AS APPLIED TO NBTA CERTIFICATION OF TRIAL ADVOCACY SPECIALISTS.

A. THE ILLINOIS COURT ERRED IN IMPOSING A BLANKET PROHIBITION ON TRUTHFUL SPEECH THAT IS NOT INHERENTLY MISLEADING.

In this case, the Court revisits well-trod territory.

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[2]Amici do not overlook the fact that government, corporations, the insurance industry, and defense law firms employ large numbers of litigation attorneys and may find NBTA certification useful in making hiring decisions. The lower court's decision does not affect their access to information. Those seeking redress of their legal rights, whose counsel may be opposing such entities in the courtroom, are deprived of that information. Thus the decision of the Illinois court has the perverse effect of comforting the comfortable, while afflicting the afflicted.

[3]Persons accused of crimes, of course, also face the problem of locating competent counsel. NBTA operates a separate program which culminates in certifying Criminal Trial Specialists. While the validity of disclosing that certification is not directly at issue in this case, presumably Rule 105(a)(3) prevents such disclosure.

> The First Amendment principles governing state regulation of lawyer solicitations for pecuniary gain are by now familiar: "Commercial speech that is not false or deceptive and does not concern unlawful activities . . . may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer [v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985)] at 638 (citing *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York,* 447 U.S. 557, 566 (1980)). Since state regulation of commercial speech "may extend only as far as the interest it serves," *Central Hudson, supra,* at 565, state rules that are designed to prevent the "potential for deception and confusion . . . may be no broader than reasonably necessary to prevent the" perceived evil. *In re R.M.J.,* 455 U.S. 191, 203 (1982).

Shapero v. Kentucky Bar Assn., ___ U.S. ___, 108 S.Ct. 1916, 1921 (1988).

The sole reason advanced by the Illinois court for holding that the First Amendment does not protect Peel's disclosure of NBTA certification was that the statement was "misleading." This Court has addressed this issue with precision:

> Commercial speech doctrine, in the context of advertising for professional services, may be summarized generally as follows: Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of the advertising

suggests that it is *inherently* misleading or when experience has proved that *in fact* such advertising is subject to abuse, the States may impose appropriate restrictions. Misleading advertising may be prohibited entirely. But the States *may not place an absolute prohibition on certain types of potentially misleading information, e.g., a listing of areas of practice, if the information may be presented in a way that is not deceptive.* Thus, the Court in *Bates* suggested that the remedy in the first instance is not necessarily a prohibition but preferably a requirement of disclaimers or explanation. 433 U.S., at 375, 97 S. Ct., at 2704. Although the potential for deception and confusion is particularly strong in the context of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent the deception.

In re R.M.J., 455 U.S.191, 203-04 (1982)(Emphasis added).

Under these principles, this Court has never upheld a blanket prohibition on communicating certain types of information in written or printed advertisements. *See, Bates v. State Bar of Arizona,* 433 U.S. 350 (1977)(striking down ban on price advertising); *In re R.M.J.*, 455 U.S. 191 (1982)(ban on non-approved listing of areas of practice and jurisdictions in which attorney is licensed); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626 (1985)(ban on illustrations and information concerning specific legal problems); *Shapero v. Kentucky Bar Assn.*, ___ U.S. ___, 108 S.Ct. 1916 (1988)(ban on targeted direct mail addressing specific legal problem). Indeed, this Court has viewed the blanket bans in those cases as "substantially excessive, disregarding 'far less restrictive and more precise means.'" *Board of Trustees of the State University v. Fox,* ___ U.S. ___, 109 S.Ct. 3028, 3034 (1989).

Two state supreme courts have addressed the identical issue that is presented in this case. In *Johnson v. Director of Professional Responsibility,* 341 N.W.2d 282 (Minn. 1983), the director admonished attorney Johnson for advertising his NBTA certification as a civil trial specialist. The director relied upon Minnesota Code of Professional Responsibility Rule 2-105(B), which provided: "A lawyer shall not hold out himself or his firm as a specialist unless or until the Minnesota Supreme Court adopts or authorizes rules or regulations permitting him to do so." The Court took special cognizance of the fact that "NBTA applies a rigorous and exacting set of standards and examinations on a national scale before certifying a lawyer as a trial specialist, either criminal or civil or both." 341 N.W.2d at 283. The court upheld the finding by the disciplinary panel that the advertisement was not misleading or deceptive. After an extensive review of *In re R.M.J.*, 455 U.S. 191 (1982), particularly the guideline that the preferred remedy is more disclosure rather than less, the Minnesota Court held that the "blanket prohibition on all commercial speech regarding specialization" in Rule 2-105(B) was unconstitutional under the First Amendment. 341 N.W.2d at 285.

More recently, an attorney petitioned the Supreme Court of Alabama for a writ of mandamus to the state bar to permit lawyers to advertise that they have been certified as civil trial specialists by NBTA. *Ex Parte Howell,* 487 So. 2d 848 (Ala. 1986). The state bar argued that the advertisement violated the state's Rule 2-104 that "A lawyer shall not state or imply that the lawyer is a specialist . . . " and was inherently misleading. The court found that "Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face." 487 So. 2d at 851. Applying the principles set out in *In Re R.M.J.*, 455

U.S. 191 (1982), the Alabama court conditionally granted the writ, directing the state bar "to formulate a proposed rule and method for approving organizations such as NBTA before allowing the certifications to be advertised." 487 So. 2d at 851.

In this case, there was no contention that Peel's statement was untruthful; nor was there any evidence that experience had shown it to be misleading in fact. A blanket ban on the use of the words "certified" and "specialist" could be imposed, consistent with this Court's decisions, only upon a finding that they are *inherently* misleading.

The Illinois court, amici argue, made no such finding. The court stated only that the terms were "misleading" for two reasons. First, due to the similarity between the words "certified" and "licensed," "the general public *could be misled* to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA." 534 N.E.2d at 984. (Emphasis added.) Secondly, the statement "tacitly attests to the qualifications of the respondent as a civil trial advocate." *Id.* At best, the court's own finding is that the statement is only potentially misleading.

Thus, even if this Court were to accept the purported dangers of public confusion posed by Peel's statement, the blanket prohibition represented by Rule 2-105 may not stand. This Court has clearly stated that the possibility of misinterpretation by the public is not sufficient grounds for banning such speech entirely.

> Our recent decisions involving commercial speech have been grounded in the faith that the free flow of information is valuable enough to justify imposing on would-be

> regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Zauderer v. Office of Disciplinary Counsel, 471 .U.S. 626, 645 (1985).

The bar itself bears an affirmative responsibility to minimize potential misunderstanding by means of greater information, not less.

> If the naivete of the public will cause advertising by attorneys to be misleading, then it is the bar's role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.

Bates v. State Bar of Arizona, 433 U.S. 350, 376 (1977).

Because neither the court nor the ARDC made a finding that the statement is inherently misleading or showed that it is misleading in fact, the absolute ban on disclosing NBTA certification as a civil trial specialist is violative of the First Amendment.

B. THE STATEMENT OF NBTA CERTIFICATION IS NOT POTENTIALLY MISLEADING.

Amici further submit that the Illinois court's finding that Peel's statement was misleading was clearly erroneous as a factual matter.

The lower court set forth its finding in detail:

The deception and confusion is particularly

apparent for two reasons. First, the claim of certification by the NBTA impinges upon the sole authority of this court to license attorneys in this State and is misleading because of the similarity between the words "licensed" and "certified." Webster's dictionary defines "certificate" as "a document containing a certified and usually official statement * * * , especially: a document issued by * * * a state agency * * * certifying that one has satisfactorily * * * attained professional standing in a given field *and may officially practice or hold a position in that field.*" (Emphasis added.) (Webster's Third New International Dictionary 366 (1986).) A "license" is defined by Webster's as "a right or permission granted *** by a competent authority to engage in a business or occupation * * * or to engage in some transaction which *but for such license would be unlawful.*" (Emphasis added.) (Webster's Third New International Dictionary 1304 (1986).) Indeed it is apparent from the foregoing that the general public could be misled to believe that the respondent may practice in the field of trial advocacy solely because he is certified by the NBTA. In respondent's letterhead, which we have set out above, directly below the statement concerning certification is the following: "Licensed: Illinois, Missouri, Arizona." The letterhead contains no indication that the licensure was by official organizations which had authority to license, whereas the certification was by an unofficial group and was a purely voluntary matter.

Additionally, the claim that the

> respondent is certified as a civil trial specialist by the NBTA is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate. Because not all attorneys licensed to practice law in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified.

543 N.W.2d at 984.

Every communication carries the possibility of misunderstanding. As this Court has recognized: "Condemned to the use of words, we can never expect mathematical certainty in our language." *Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972). With respect to the statement at issue here, however, amici submit that the possibilities of "deception and confusion" discerned by the lower court are too speculative and remote to outweigh the public's First Amendment right to receive the information.

The court found the statement "Certified Civil Trial Specialist by the National Board of Trial Advocacy" misleading for two reasons.[4] Amici suggest that both findings were clearly erroneous.

1. The term "certified" is not misleading or deceptive.

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[4]The court's findings are also inconsistent with each other. "Certified" is misleading, in the court's view, because the public will equate that term with "licensed." The second finding, that the statement is "tantamount to a claim of superiority" to other licensed attorneys, assumes that the public recognizes NBTA certification as a qualification beyond licensure.

The Illinois court found that the public "could be misled" due to the similarity between "certified" and "licensed." The court's sole basis for this finding is a redacted quotation from Webster's dictionary which appears to define "certificate" as a document issued by a state agency. Without explanation, however, the court replaced with ellipses those portions of the definition that might apply to NBTA certification. A member of the public who resorted to the dictionary would find the following included in the definition of certificate (underlining those portions omitted by the Illinois court):

> especially: a document issued by a school, a state agency, or a professional organization certifying that one has satisfactorily completed a course of studies, passed a qualifying examination, or has attained professional standing in a given field . . .

Webster's Third New International Dictionary 366 (1986).

The full definition simply does not support the assumption that the public will equate certification with the license to practice law issued by the court. Indeed, because a certificate might issue from governmental or private sources, the only potential for ambiguity arises where the certifying authority is not identified or bears a misleading name. In this case, the statement clearly identified the certifier as the National Board of Trial Advocacy, a name that could not reasonably be confused with the Supreme Court of Illinois.

Further, Peel's letterhead also included the statement "Licensed: Illinois, Missouri, Arizona," removing any possible conjecture that NBTA certification itself was a license to practice. Significantly, it is *this* statement that the court found incomplete for failing to indicate that the

licensures were by official organizations.

Amici also suggest that the court identified no significant harm that might befall the potential client who, unreasonably, confuses NBTA certification with license to practice in Illinois. Since NBTA requires all applicants to be members in good standing of the state bar, there is no possibility that the statement of certification could mislead an individual to retain an attorney who is not licensed. Moreover, the court possesses broad powers to punish those who engage in the unauthorized practice of law.

2. A Statement of NBTA Certification is Not Misleading as a Claim as to the Quality of Legal Services.

The lower court also erred in its second finding, that Peel's letterhead statement "is misleading because it tacitly attests to the qualifications of the respondent as a civil trial advocate." 534 N.W.2d at 984. The court seized upon this Court's dictum that claims as to quality "might be so likely to mislead as to warrant restriction." *Id.*, citing *In re R.M.J.*, 455 U.S. 191, 201 (1982). This Court has made it clear, however, that its concern was with the type of claims that consumers cannot verify:

> Although our decisions have left open the possibility that States may prevent attorneys from making nonverifiable claims regarding the quality of their services, . . . they do not permit a State to prevent an attorney from making accurate statements of fact regarding the nature of his practice merely because it is possible that some readers will infer that he has some expertise in those areas.

Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 640 n.9 (1985)(citations omitted).

NBTA certification is an objective, verifiable fact. It tells a potential client that the attorney has attained a level of experience and knowledge beyond that reflected by licensure. The lower court stated, "Because not all attorneys licensed to practice in Illinois are certified by the NBTA, the assertion is tantamount to a claim of superiority by those attorneys who are certified." 534 N.E.2d at 984. This is so. But the court does not explain how the statement misleads the public.

The fact is that a large fraction of all lawyers, particularly in larger metropolitan areas, rarely see the inside of a courtroom. People retain counsellors in areas such as tax, contracts, estate planning, and many other fields precisely to avoid potential litigation. Other attorneys have simply not attained the experience of litigating a significant number of civil cases. None, apart from those certified by NBTA, have passed the NBTA examination, peer review, and other requirements. Amici submit that the lower court's premise, that all licensed attorneys are equally qualified to handle civil litigation, is itself misleading to the public.

Reasoning of the Alabama Supreme Court, addressing this precise issue, is persuasive:

> It would be less than realistic for us to take the position that all lawyers, in fact, possess equal experience, knowledge, and skills with regard to any given area of legal practice. Although there is presently no state-sanctioned mechanism for identifying legal specialists, it appears to us that a certification of specialty by the NBTA would indicate a level of expertise with regard to trial advocacy in excess of the level of

> expertise required for admission to the bar generally. We conclude, therefore, that Howell's proposed advertisement of certification by the NBTA as a civil trial advocate would not be misleading or deceptive on its face.

Ex Parte Howell, 487 So. 2d 848, 851 (Ala. 1986).

III. BANNING STATEMENTS OF NBTA CERTIFICATION DOES NOT ADVANCE A SUBSTANTIAL STATE INTEREST.

One further justification of Rule 2-105(a)(3) was advanced by Attorney Moran, arguing as counsel for ARDC:

> [T]he State can still regulate or ban certain types of lawyer advertising if the State is advancing a substantial state interest. . . . In this case, the interest is clearly the Court's interest in having bogus certified certification groups pop up or things that you just sign in correspondence courses, things of that nature, where certification would be meaningless. The Administrator doesn't argue either way about the meaningfulness of a certification by the National Board of Trial Advocacy, but by having a complete ban on saying attorneys are certified or specialists, that is tailoring a substantial State interest that is protecting people from either meaningless or false information by having that ban an entire ban that is the best possible remedy to the situation that is before the Court.

Transcript of Hearing Board proceedings, July 27, 1987, at 49-50, reprinted in Petition at 37a.

Although neither the Hearing Board nor the Illinois Supreme Court alluded to this reasoning, it raises a matter of serious concern to amici as cosponsors of NBTA.

ARDC is correct in stating that the State may regulate commercial speech to advance a state interest. However, as this Court has recently reemphasized:

> [W]e require the government goal to be substantial, and the cost to be carefully calculated. Moreover, since the State bears the burden of justifying its restrictions, see *Zauderer, supra,* at 647, it must affirmatively establish the reasonable fit we require.

Board of Trustees of the State University v. Fox, ___U.S. ___, 109 S. Ct. 3028, 3035 (1989). That "fit" requires the State to employ "a means narrowly tailored to achieve the desired objective." *Id.*

The position of ARDC, that a prophylactic ban on all attorney commercial speech regarding specialist certification serves to prevent bogus certification programs, is similar to that advanced by the State in *Zauderer* to ban the use of legal advice and information in advertising. This Court's response is directly applicable in this case:

> The State's argument that it may apply a prophylactic rule to punish appellant notwithstanding that his particular advertisement has none of the vices that allegedly justify the rule is in tension with our insistence that restrictions involving commercial speech that is not deceptive be

> narrowly crafted to serve the State's purposes. . . .
>
> We need not, however, address the theoretical question whether a prophylactic rule is ever permissible in this area, for we do not believe that the State has presented a convincing case for its argument that the rule before us is necessary to the achievement of a substantial governmental interest.[5]

Zauderer v. Office of Disciplinary Counsel, 471 .U.S. 626, 645 (1985).

Amici acknowledge that protecting the public from being misled by spurious certification programs is a legitimate state interest. Whether it is substantial is open

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[5]Amici are mindful that members of this Court view the Court's recent attorney advertising decisions as ill considered, based on "a defective analogy between professional services and standardized consumer products." *Shapero v. Kentucky Bar Assn.,* 109 S.Ct. 1916, 1928 (1988) (O'Connor, J., dissenting); *Zauderer v. Office of Disciplinary Counsel,* 471 U.S. 626, 677 (1985)(O'Connor, J., dissenting). The concern there strongly stated is that the Court has tied the hands of the States in safeguarding the professionalism of attorneys. Of particular concern is that price advertising and unsolicited legal advice to attract clients may place the economic interests of lawyers in conflict with the "exercise of independent professional judgment on behalf of their clients." *Zauderer* at 679. Amici suggest that the disclosure of NBTA certification presents no such threat to professionalism. Indeed, by providing potential clients with an objective, verifiable measure of an attorney's advocacy qualifications, certification may serve to counteract more objectionable advertising.

to question. ARDC did not indicate that any such programs exist in Illinois or anywhere else, and amici are aware of none. Nor is there any indication that they are at all likely to arise in the future.

In any event, there are means far short of an absolute ban to protect the public. These means are not only reasonable and feasible, they are actually employed by other states. The Supreme Court of Minnesota adopted a position of evaluating certifying programs on a case-by-case basis. The court stated that "discipline could be imposed if the particular certification advertised was perfunctorily granted by an organization with few or no standards and there was a finding that the advertising was false, fraudulent, misleading or deceptive." *Johnson v. Director of Professional Responsibility,* 341 N.W.2d 282, 285 (Minn. 1983).

The Alabama Supreme Court directed the state bar

> to formulate a proposed rule and method for approving organizations such as NBTA before allowing the certifications to be advertised. Such a procedure, in combination with the existing requirement of review by the Bar Association of all legal advertisement . . . will reduce the possibility of spurious certifying organizations being used to mislead the public.

Ex Parte Howell, 487 So. 2d 848, 851 (Ala. 1986). The states of Connecticut and Georgia have adopted certification standards which recognize NBTA certification while protecting the public from "meaningless" programs. *See* Amicus Curiae Brief of National Board of Trial Advocacy, at 2. The state of Florida has undertaken a

certification program in cooperation with NBTA. *Id.*

Amici are concerned that a decision permitting a ban on attorney disclosure of NBTA certification will effectively end efforts to improve the calibre of trial advocacy and to provide consumers with the information they need to make an informed decision in retaining trial counsel. Experience indicates that the large start-up costs and relatively high operating expenses associated with meaningful certification programs make individual state programs infeasible in many parts of the country. Lumbard, *Specialty Certification for Lawyers: The National Alternative to the Non-Existent State Programs,* 1981 Women Lawyers J. 23

CONCLUSION

For these reasons, amici urge this Court to reverse the decision by the Illinois Supreme Court and hold Illinois Code of Professional Responsibility Rule 2-105(a) unconstitutional as violative of the First Amendment.

Respectfully submitted,

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